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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 TARRELL M. SMITH,

Case No. 2:13-cv-01255-JAD-PAL

9 *Plaintiff,*

10 vs.

ORDER

11
12 JULIO MESA,

13 *Defendant.*
14

15 This *pro se* prisoner civil rights action by a Nevada state inmate comes before the
16 Court on plaintiff's application (Dkt. #1) to proceed *in forma pauperis* for initial review under
17 28 U.S.C. § 1915A.

18 When a "prisoner seeks redress from a governmental entity or officer or employee of
19 a governmental entity," the court must "identify cognizable claims or dismiss the complaint,
20 or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a
21 claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who
22 is immune from such relief." 28 U.S.C. § 1915A(b).

23 In considering whether the plaintiff has stated a claim upon which relief can be granted,
24 all material factual allegations in the complaint are accepted as true for purposes of initial
25 review and are to be construed in the light most favorable to the plaintiff. See, e.g., *Russell*
26 *v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions
27 unsupported by any actual allegations of fact are not assumed to be true in reviewing the
28 complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-81 & 686-87 (2009). That is, bare and

1 conclusory assertions that constitute merely formulaic recitations of the elements of a cause
 2 of action and that are devoid of further factual enhancement are not accepted as true and do
 3 not state a claim for relief. *Id.*

4 Further, the factual allegations must state a plausible claim for relief, meaning that the
 5 well-pleaded facts must permit the court to infer more than the mere possibility of misconduct:

6 [A] complaint must contain sufficient factual matter,
 7 accepted as true, to “state a claim to relief that is plausible on its
 8 face.” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127
 9 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).] A claim has facial
 10 plausibility when the plaintiff pleads factual content that allows the
 11 court to draw the reasonable inference that the defendant is liable
 12 for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The
 13 plausibility standard is not akin to a “probability requirement,” but
 14 it asks for more than a sheer possibility that a defendant has
 15 acted unlawfully. *Ibid.* Where a complaint pleads facts that are
 16 “merely consistent with” a defendant’s liability, it “stops short of
 17 the line between possibility and plausibility of ‘entitlement to relief.’
 18 ” *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

19 [W]here the well-pleaded facts do not permit the court
 20 to infer more than the mere possibility of misconduct, the
 21 complaint has alleged - but it has not “show[n]” - “that the pleader
 22 is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

23 *Iqbal*, 556 U.S. at 678.

24 Allegations of a *pro se* complainant are held to less stringent standards than formal
 25 pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

26 In the complaint, plaintiff Tarrell M. Smith alleges that on December 9, 2012,
 27 correctional officer Julio Mesa searched his prison cell while Smith and his cellmate were
 28 away for recreation. According to the complaint, Mesa was seen by another inmate pulling
 a piece of metal from the air vent, and he then attempted to bend the metal into the shape of
 a weapon. However, correctional officers Blake and Richardson saw Mesa doing this and told
 him that it was just a piece of the vent. Plaintiff alleges that when he and his cellmate
 returned, Mesa came to the cell and said: “Consider yourselves lucky, ‘cause I had you guys
 on the way to the hole, but you need to thank Blake ‘cause she saved you.” Plaintiff alleges
 that Mesa has been targeting him since he “wrote NV-Cure on him,” with NV-Cure apparently
 being a prisoner advocacy organization or website.

1 Plaintiff alleges that Mesa's actions violated his Eighth Amendment right to be free from
2 cruel and unusual punishment and constituted "discriminatory harassment, negligence, and
3 retaliation."

4 Plaintiff names officer Mesa as the sole defendant in both his individual and official
5 capacity. He prays for, *inter alia*: (1) a formal public apology; (2) an order directing that
6 correctional officers follow administrative regulations allegedly requiring that inmates be
7 present when their cells are searched; (3) damages for mental distress and pain and suffering;
8 and (4) apparently enforcement of sundry other alleged requirements under state
9 administrative regulations.

10 The complaint fails to state a claim upon which relief may be granted.

11 Plaintiff was not subjected to any cruel and unusual punishment in violation of the
12 Eighth Amendment.

13 Even if the Court were to assume, *arguendo*, that what Mesa intended to do would
14 have constituted cruel and unusual punishment, the other two officers stopped Mesa from
15 doing what he allegedly planned to do. By analogy, if a correctional officer indicated to other
16 officers that he planned to viciously and excessively beat a prisoner but the other officers did
17 their constitutional duty and kept him from doing so, there would be no Eighth Amendment
18 violation. Here, the other officers kept Mesa from doing what he allegedly was going to do.
19 Alleged bad intention by one officer that properly is thwarted by other officers doing their duty
20 does not give rise to a viable Eighth Amendment claim.

21 Moreover, while being placed in disciplinary segregation on allegedly framed evidence
22 (which did not actually occur) possibly may violate other constitutional protections in certain
23 circumstances, it does not constitute cruel and unusual punishment. That is, the typical
24 conditions of disciplinary segregation, which largely mirror those of administrative and
25 protective segregation, do not violate the Eighth Amendment. *Cf. Sandin v. Conner*, 515 U.S.
26 472, 485-86 (1995)(being subjected to disciplinary or punitive segregation, which mirrors the
27 conditions of administrative segregation and protective custody, in and of itself does not give
28 rise to a liberty interest protected by procedural due process guarantees).

1 Plaintiff otherwise does not state a viable claim based upon Mesa stating to him that
2 he was going to send him to “the hole” but another officer stopped him. Verbal harassment,
3 including even threats of bodily injury, does not give rise to a viable Eighth Amendment claim.
4 *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir.1996), *amended by* 135 F.3d 1318 (9th Cir.1998);
5 *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir.1987); *Gaut v. Sunn*, 810 F.2d 923, 925
6 (9th Cir.1987).

7 Even looking at the allegations from the viewpoint of retaliation for alleged First
8 Amendment activity, *de minimis* actions allegedly taken in retaliation for the exercise of First
9 Amendment rights do not give rise to a constitutional violation. *See, e.g., Blair v. Bethel*
10 *School District*, 608 F.3d 540, 544 (9th Cir. 2010); *Maryland A.C.L.U. v. Wicomico County*, 999
11 F.2d 780, 785, 786 n. 6 (4th Cir.1993)(cited with approval in an unpublished Ninth Circuit
12 prison conditions case). Allegations that the officer told the plaintiff that he was going to take
13 action to put him in disciplinary segregation but the plaintiff was lucky that the defendant was
14 stopped by other officers does not rise above this nonactionable *de minimis* level.

15 Nor is negligence actionable under § 1983 on an Eighth Amendment claim or a due
16 process claim. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834-36 (1994); *Daniels v.*
17 *Williams*, 474 U.S. 327 (1986); *Sorrells v. McKee*, 290 F.3d 965, 972 (9th Cir. 2002).

18 Finally, even if the complaint stated a viable constitutional claim, which it does not,
19 much of the relief sought is not available. A plaintiff may not secure an order in a federal civil
20 rights action directing an officer to make a public apology and/or directing that the alleged
21 requirements of state regulations be followed. *Cf. Sandin*, 515 U.S. at 480-84 (mere violation
22 of alleged mandatory requirements of state regulations does not give rise to a viable
23 constitutional claim).¹

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27 ¹An inmate has no expectation of privacy in a prison cell, and the Fourth Amendment therefore is
28 inapplicable to a search of the cell. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 522-30 & n.8 (1984). If state
administrative regulations allegedly require that the prisoner be present when the cell is searched, the failure
to follow such a requirement does not give rise to a federal constitutional claim.

1 The complaint therefore will be dismissed for failure to state a claim. The Court finds
2 that delay of entry of final judgment for an opportunity to amend would be futile, given that
3 plaintiff is seeking to base his claims on a *de minimis* incident where other officers intervened
4 to prevent allegedly improper action by the defendant officer.

5 **IT THEREFORE IS ORDERED** that plaintiff's application (Doc. 1) to proceed *in forma*
6 *pauperis* is **GRANTED**, subject to the remaining provisions herein. Plaintiff shall not be
7 required to pay an initial partial filing fee. However, even if the action is dismissed, plaintiff
8 must pay a full filing fee pursuant to 28 U.S.C. § 1915(b)(2).

9 **IT FURTHER IS ORDERED** that the movant herein is permitted to maintain this action
10 to a conclusion without the necessity of prepayment of any additional fees or costs or the
11 giving of security therefor. This order granting *forma pauperis* status shall not extend to the
12 issuance of subpoenas at government expense.

13 **IT FURTHER IS ORDERED** that, pursuant to 28 U.S.C. § 1915(b)(2), the Nevada
14 Department of Corrections shall pay to the Clerk of the United States District Court, District
15 of Nevada, 20% of the preceding month's deposits in plaintiff's account (in the months that the
16 account exceeds \$10.00) until the full \$350.00 filing fee has been paid. **The Clerk of Court**
17 **shall SEND a copy of this order to the Finance Division of the Clerk's Office. The Clerk**
18 **shall also SEND a copy of this order to the attention of the Chief of Inmate Services for**
19 **the Nevada Department of Corrections, P.O. Box 7011, Carson City, NV 89702.**

20 **IT FURTHER IS ORDERED** that the Clerk shall file the complaint and that this action
21 shall be **DISMISSED** for failure to state a claim upon which relief may be granted.

22 The Clerk of Court shall enter final judgment accordingly.

23 DATED: December 13, 2013.

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26 Jennifer Dorsey
27 United States District Judge
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